

PATTON, BOGGS & BLOW

2550 M STREET, N.W.

WASHINGTON, D. C. 20037

(202) 457-6000

CABLE BARPAT
TELECOM 457 6315

WU TELEX 89 452
ITT TELEX 440324

LONDON
COTT HOUSE
CAMONILE STREET
LONDON EC3A 7DN
01-283 9981
TELEX 889 2384

SAUDI ARABIA
P.O. BOX 154
HAMOUD STREET
AL KHOBAR SAUDI ARABIA
864 3083
TELEX 87 1318

SHAOUL ASLAN
RICHARD S. CHARIN
STEVEN M. SCHNEEBACH
DON A. ALLEN
DUNE B. SILER
RICHARD W. STOLBACH
KATHARINE R. BOYCE
SCOTT NASON STONE
GEORGE M. BORABABY
JEANNE M. ROSLANOWICZ
JEFFREY T. SMITH
RONALD R. HENRY
FRANK R. SAMPOLIS
GEORGE J. SCHUTZER
MICHAEL D. ESCH
RALPH G. STEINHARDT II
ANDREW S. NEWMAN
CLAUDIA L. DEERING

HARVEY J. BAKER
FRANK J. DONATELLI
FLORENCE W. PRIOLEAU
JONATHAN C. CARLSON
CLIFF HASSA III
RUSSELL V. RANDLE
SEAN P. MCGUINNESS
MICHAEL G. PLANTAMURA
LISA A. SHAPIRO
JEREMY W. LINDEN
DANIEL P. HARRIS
JOAN MCCARTHY
JEFF TURNER
CHARLES E. TALISMAN
IRA A. FISHMAN
JEANNE C. TRAHAN

OF COURSE
WILLIAM D. RATHBURN
CHARLES D. COOK
UNITED STATES DIRECTOR

June 30, 1983

Emily H. Rock
Secretary
Federal Trade Commission
6th & Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Re: Request for Comments on Possible
Modifications to the Present FTC
Cigarette Testing Methodology

Dear Ms. Rock:

I. Introduction

On behalf of our client, Liggett & Myers Tobacco Company, Inc. ("Liggett"), we are responding to the Federal Trade Commission's ("FTC") request for comments regarding possible changes in the FTC testing methodology for cigarettes. Liggett is the smallest of the major United States manufacturers of cigarettes, but it has been a major catalyst for innovation and increased competition in the cigarette industry -- an industry which most observers would conclude is dominated by two firms: Philip Morris, Inc. ("Philip Morris") and R.J. Reynolds Tobacco Company ("Reynolds"). One of Liggett's most important and recent competitive innovations has been the successful introduction of generic cigarettes.



2023093927

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Two

Liggett sincerely believes that any change in the present FTC testing methodology will jeopardize its competitive position and could have a very severe impact on Liggett's efforts to gain consumer acceptance of generic cigarettes. Liggett simply cannot afford the significant and unknown additional costs that will result from a modification of the testing procedures. But perhaps of even greater significance, the best scientific evidence available, including independent analysis commissioned by Liggett, demonstrates that the current test reliably ranks cigarettes according to tar and nicotine content. This is all that can be reasonably expected from a standardized test. Thus, there is no scientifically justifiable reason for altering the existing test.

Even assuming, arguendo, that the current FTC test has some imperfections -- as any standardized test will when applied to particular brands -- none of the FTC's proposed "remedies" would be in the public interest. Each of the "remedies" would create new problems for consumers which would outweigh any possible benefits. Accordingly, as will be elaborated upon in these comments, the current FTC test should not be altered, and if it is altered, it should not be altered in any of the ways suggested by the FTC.

2023093928

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Three

II. The Existing FTC Testing Methodology Accurately Ranks Cigarettes According to Tar and Nicotine.

In assessing the adequacy of the existing testing methodology, the FTC must not lose sight of the purpose of the test. The purpose of the test is not, and never has been, to duplicate individual smoking behavior. As the FTC recognized when it first adopted the current testing methodology, "There is no human smoker who smokes, and no cigarette that is smoked, under conditions that precisely duplicate either the Cambridge Filter Method in its original form or as modified by the Commission." Federal Trade Commission "Statement of Considerations" (1967). A number of different variables affect actual tar and nicotine intake by an individual smoker, and these variables change from smoker to smoker. The variables include the number of cigarettes smoked, puff volume, puff frequency, puff duration, inhalation depth, the smoker's metabolism, and the smoker's body weight.

Similarly, the purpose of the FTC testing is not to duplicate the smoking technique of an "average" smoker. As the FTC originally recognized, such an effort would be highly misleading:

"There are too many variables as to both smokers and to smoking conditions for any average to be meaningful. Test results phrased in terms of an 'average' smoker could be misleading to the public because a smoker has no way of knowing how closely his smoking habits conform to those of the purportedly 'average' smoker." Id.

2023093929

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Four

Instead, the purpose of the FTC test is to "provide some objective basis for ranking the yields of cigarettes." Lynn T. Kozlowski, "Report on Barclay" (submitted to the FTC as part of the current investigation). Further, the FTC test is designed to be a standardized test. Thus, by definition it is not and cannot be perfectly correlated to the characteristics of any particular smoker or to any particular brand of cigarettes. The current FTC test fulfills its original purpose. It does accurately rank cigarettes according to tar and nicotine yields. Numerous scientific studies support this conclusion.

The first important study relevant to this issue was conducted by Dr. Gio Gori of the Franklin Research Institute. Dr. Gori compared cotinine levels in blood plasma resulting from the smoking of ultra-low tar and nicotine cigarettes. Gio B. Gori and Cornelius J. Lynch, "Analytical Nicotine Yields as Predictors of Smoker Intake From 1 mg Nominal FTC Tar Cigarettes" submitted to the FTC on February 12, 1981 (hereafter the "Gori Report"). Cotinine is the primary metabolic product of nicotine, and as such it is the best measure of the amount of nicotine actually absorbed into a smoker's body. Dr. Gori's cotinine study resulted in the same relative rankings with regard to nicotine as result from the current FTC testing procedure.

Other work by Gori shows that not only does cotinine analysis result in the same relative rankings as are indicated by

20230933930

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Five

the current FTC test, but cotinine analysis also results in the same ratios of tar and nicotine among ultra-low-yield cigarettes. See discussion of Gori's research in the Report of Dr. Gabriel L. Plaa and Dr. David P. Westfall attached hereto. Thus, Gori's work provides strong evidence that the FTC testing procedure is producing accurate results for Barclay and the other ultra-low-yield cigarettes.

Dr. Gori's results are reinforced by a pharmacokinetic study by Dr. T. D. Darby and James E. McNamee entitled "Review of Methods Used to Determine Nicotine Absorption" which already has been submitted to the FTC. Although this study did not result in the same nominal FTC nicotine yields, it did result in the same relative rankings as resulted from the FTC test.

In light of various technical criticisms which the FTC consultants leveled against the Gori and Darby research, Liggett approached two independent and extremely well respected experts in pharmacology, Professor Gabriel Plaa of the Faculty of Medicine, University of Montreal, and Professor David P. Westfall of the School of Medicine, University of Nevada, to review the data base and comment on the FTC consultants' criticisms. Dr. Plaa is a member and former chairman of the Department of Pharmacology, Faculty of Medicine, University of Montreal. He also is Vice-Dean for Research at the University of Montreal. He has written numerous articles on pharmacology, and he is on the editorial

2023093931

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Six

board of a number of journals, including the Journal of Pharmacology and Experimental Therapeutics. He has served as the President of the Pharmacological Society of Canada. Dr. Westfall is Chairman of the Pharmacology Department at the University of Nevada School of Medicine. The Report of Drs. Plaa and Westfall as well as their resumes are attached.

Drs. Plaa and Westfall conclude that plasma cotinine is currently the most reliable measure of human absorption of nicotine. They also conclude that the cotinine research by both Gori and Darby was properly conducted in accordance with established scientific procedures with adequate controls. Plaa and Westfall further found that the Gori and Darby research does support the conclusion that the current FTC testing methodology accurately places Barclay in the same category as Cambridge, Now and Carlton.

With respect to the FTC consultants' criticism that Gori and Darby should have included a high tar and nicotine yield cigarette in the sample, Plaa and Westfall believe that a high-yield sample was not necessary in order to assess the FTC's question of whether Barclay belongs in the ultra-low category. The research by both Gori and Darby showed remarkably similar cotinine yields from each of the cigarettes currently classified in the ultra-low category. Also of great significance is the finding by Plaa and Westfall that the ratios of cotinine yields

20230933932

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Seven

between different brands were almost identical to the ratios of tar and nicotine between brands as indicated by the FTC testing procedure. This data strongly supports the conclusion that Barclay properly belongs in the same category as Now, Cambridge, and Carlton.

Even if a high-yield sample were to result in comparable cotinine yields as are produced by the low tar and nicotine cigarettes,^{*/} such a hypothetical finding would not mean that cotinine values for low-yield cigarettes are inaccurate. Indeed, such a finding could indicate the much more significant conclusion that high-yield cigarettes are not such a health hazard as the FTC now assumes.

The analysis by Drs. Plaa and Westfall also responds to concerns about an alleged "absence of a proven dose-response relationship between blood cotinine and FTC nicotine yields." E.g., see Report of M. Guerin (March 12, 1982). Drs. Plaa and Westfall found that a plotting of plasma cotinine levels versus

^{*/} No reasonable scientific data supports the surmise that high-yield cigarettes will result in approximately the same cotinine values as are produced by low-yield cigarettes. The Hill and Marquardt study cited by FTC consultant Kozlowski involved only three subjects and even that unreliable sample showed higher cotinine values for nominally high-yield cigarettes than for nominally low-yield cigarettes.

2023093933

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Eight

the number of cigarettes consumed does indeed establish a dose-response relationship. Moreover, Plaa and Westfall conclude that even such small differences as 0.1 mg. as measured by the FTC testing methodology result in significant and measurable differences in plasma cotinine levels.

Finally, the analysis by Plaa and Westfall indicates that smoking behavior does not disproportionately increase cotinine levels for Barclay smokers when compared to smokers of other low-yield brands. Had there been a systematic circumvention of the Barclay filter, a higher percentage of subjects in the Darby study would have exhibited significantly larger plasma cotinine values.

In short, the existing FTC testing methodology appears to accurately measure nicotine intake -- at least for nominally low-yield cigarettes. No cotinine research undertaken by anyone indicates to the contrary. Instead, we submit that the only basis which the FTC has for believing that Barclay is inaccurately ranked is the intuitive feeling that Barclay must have a higher tar and nicotine yield than the other ultra-low tar and nicotine cigarettes because (i) it tastes better and (ii) admittedly artificial, and thus unreliable, ventilation studies submitted to the FTC by Reynolds and Philip Morris suggest Barclay may be misclassified. Changes in the FTC testing methodology which could have profound adverse effects on competition should not

2023093934

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Nine

be based on intuitive feelings or research proffered by the dominant competitors in the industry. Indeed, it would appear imperative that a federal regulatory agency charged with both consumer protection and competitive mandates should act in response to clear and reliable scientific evidence. Such scientific evidence does not now exist.

III. The Proposed Alterations to the FTC Test are Inequitable and Discriminatory.

The FTC currently is proposing to change a standardized test which by definition is not supposed to duplicate actual smoking behavior. Ironically, the basis for the FTC's proposed change is the mistaken belief that one form of perceived individual smoking behavior distorts the reported tar and nicotine levels in one type of cigarette. Based on what we believe can only be described as biased, self-serving research submitted by Philip Morris and Reynolds, the FTC appears to believe that smokers' lips occlude the exits on the Barclay filter and that Barclay smokers crush the filter, blocking the air-vent channels. However, careful research conducted by Roger D. Kamm of the Massachusetts Institute of Technology and submitted to the FTC conclusively shows that the current FTC cigarette holder closely approximates the pressure from human lips. Further, the FTC's independent consultant, Fred G. Bock, concluded in his "Report on the Appropriateness of FTC Tar and Nicotine Assays of

2023093935

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Ten

Barclay Cigarettes" (March 16, 1982) that there is no evidence establishing that smokers actually crush Barclay filters and no evidence even indicating the extent to which smokers compress Barclay ventilation channels.

Even if there were some compression and occlusion of ventilation channels in Barclay filters, the effect on nicotine intake would be relatively insignificant when compared to the effect of smoking behavior on actual nicotine intake in other brands. Research conducted by Lynn Kozlowski (before he was retained by the FTC) indicates a significant amount of hole blocking by smokers of ultra-low tar and nicotine cigarettes. L. Kozlowski et al., "The Misuse of 'Less Hazardous' Cigarettes and Its Detection: Hole Blocking Ventilated Filters", 70 American Journal of Public Health 11, (1980). Professor Kozlowski reported, "[W]e have found in systematic interviews that 32 percent to 69 percent (95 percent confidence interval) of low-tar smokers have blocked the holes with their fingers, lip or with tape." Id.

However, the FTC proposals do not even attempt to confront the problem of hole-blocking and other forms of compensatory smoking. Rather, the FTC tries to distinguish Barclay from the other ultra-low tar and nicotine cigarettes on the ground that reduced ventilation in Barclay is "inevitable and cannot be avoided by the informed consumers. . . ." while hole blocking and compensatory smoking of other ultra low-tar and nicotine

2023093936

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Eleven

cigarettes can be avoided by an "informed" consumer. See FTC Determination Re Barclay Cigarettes (April 13, 1983).

Such a distinction is unsupportable. First, cigarettes such as Merit have invisible air ventilation holes so that even the most sophisticated smoker would have difficulty avoiding blockage of such holes. Second, cotinine research performed by Dr. Gori and described in the Report of Drs. Plaa and Westfall, indicates that Barclay smokers do not always absorb more nicotine than the FTC tests specify. Third, as a matter of reality, there are very, very few, if any, individuals who meet the FTC's hypothetical standard of an "informed consumer." As Lynn Kozlowski has noted:

"Most of the individuals who misused the ventilated cigarettes in this way [hole blocking] were unaware that they were blocking the holes. So, lecturing to a group of smokers about this problem usually results in skepticism or denial rather than repentance and promises to do better."
Lynn T. Kozlowski, "Applications of Some Physical Indicators Cigarettes Smoking", 6 Addictive Behaviors, 213-219 (1981).

Thus, even Kozlowski's research indicates that consumers simply cannot be educated with respect to hole blocking and compensatory smoking behavior.

Moreover, the FTC's hypothetical "informed consumer" inevitably would engage in other forms of unconscious compensatory smoking behavior in order to satisfy a taste for nicotine. It appears that smokers automatically adjust smoking habits to obtain

2023093937

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Twelve

some "optimum" nicotine level either by increasing the number of low tar and nicotine cigarettes they smoke or by increasing the depth and duration of their puffs. H. Ashton and D. W. Watson, "Puffing Frequency and Nicotine Intake in Cigarette Smokers," British Medical Journal, September 19, 1970. As Kozlowski has written, unconscious compensatory smoking behavior can take many forms:

"It is especially important to realize that hole-blocking is only one form of compensatory smoking behavior. The fact that one does not block the holes does not also mean that one does not take more frequent, larger, deeper or longer inhalations from these cigarettes." Lynn T. Kozlowski, "Perceiving The Risks of Low-Yield Ventilated--Filter Cigarettes: The Problem Hole Blocking," presented at International Workshop on the Analysis of Actual vs. Perceived Risks, June 2, 1981.

In short, even assuming, arguendo, that smoking behavior is relevant to the performance of a standardized test, we do not believe the FTC has any direct evidence that the smoking behavior of consumers of Barclay causes them to inhale more tar and nicotine than does the smoking behavior of consumers of other ultra-low tar and nicotine cigarettes. Absent such proof, it would be unfair and inequitable to discriminate against Barclay while letting other ultra-low cigarettes manufactured by the market leaders continue to tout their purported advantages. Moreover, to change testing procedures in the absence of direct evidence that consumers of Barclay absorb more nicotine and tar

2023093938

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Thirteen

than do consumers of other ultra-low brands would have serious competitive consequences to the firms in this industry who are trying to compete with Philip Morris and Reynolds. If the reason for the proposed changes were sound, one might well conclude that competitive factors were less important than consumer welfare. But as this clearly is not the case; there appear to be no sound reasons to change the FTC testing procedures.

IV. The FTC's Proposed Discrimination Against
Barclay-Type Filters Will Have Many
Unintended Harmful Effects on the Consumer.

Consumers and certainly consumer education would be injured in a number of respects if the FTC were to alter its testing methodology in response to what we believe to be slim, inconclusive evidence presented largely by Reynolds and Philip Morris. Although the FTC may have nonpublic information available that is arguably supportive, such information is not known to the respected pharmacologists whom we retained. Without a proper basis, the proposed changes would harm competition as well as inhibit consumers from switching to low tar and nicotine brands.

The proposed changes would harm competition and further entrench the substantial market power of Reynolds and Philip Morris. Every time the FTC testing methodology is changed, significant costs are imposed on cigarette manufacturers. Such costs fall disproportionately on the small manufacturers --

2023093939

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Fourteen

particularly Liggett. Any change in the testing methodology (i) would cause Liggett to implement new quality control procedures to monitor its brands' performance under the new test, (ii) would require the complex reformulation of each brand's particular blend of different types, grades, and seasonings of tobaccos, and (iii) would necessitate the possible relabeling of all brands. At the current time, Liggett produces over 160 separate brands of cigarettes for its own labels as well as for generic and private label customers. This is an incredible number of brands, a number probably much higher than the total number of brands marketed domestically by all domestic manufacturers.

Also, the marketing of existing brands would have to be reexamined at a significant cost to cigarette manufacturers. Even if the new test yielded the same relative tar and nicotine rankings as currently exist, any change in the absolute number would cause significant consumer confusion. Although the absolute numbers are meaningless by themselves, consumers have come to rely on the absolute numbers with which they are familiar.

To the extent that consumer confusion could not be ameliorated by expensive marketing campaigns, cigarette companies would have to alter the blends of their cigarettes in an effort to maintain the same absolute tar and nicotine numbers that are produced under the existing tests. Such an undertaking is

2023093940

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Fifteen

incredibly difficult and very expensive, creating virtually insurmountable hardship to smaller manufacturers who in Liggett's case have only recently been able to gain consumer acceptance of their new blends. Indeed, the successful development of new blends is a process which takes years to accomplish. With so many different brands in the emerging generic and private label market, Liggett would face staggering obstacles. The net effect could be to choke off a competitive innovation in this industry in its infancy.

The proposed alterations of the FTC testing methodology would harm innovation in other respects as well. All but the most firmly entrenched firms would be reluctant to engage in any meaningful innovation. If the FTC demonstrates a willingness to change its testing methodology to cure relatively minor perceived problems with every innovation, no incentives for innovation would exist. Certainly, the threat of FTC meddling is real because no standardized test could yield perfect results when compared to particular product innovations. Thus, alteration of the FTC's test in response to the Barclay filter would send a message that the FTC intends to hold all innovations to impossible standards which are not applied to other brands. All of this, of course, in apparent response to the effort by the two major competitors working against the interests of a much smaller firm.

2023093941

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Sixteen

By removing incentives for innovation and by imposing significant costs on the manufacturing of cigarettes, the FTC's proposed conduct of altering the FTC testing methodology also would serve to further entrench the dominate market positions of Philip Morris and Reynolds. As market leaders, these two companies already control approximately 70 percent of all industry sales and have strong incentives to go to great lengths to impede innovation by their rivals.

Indeed, we can only suggest what is obvious: Reynolds and Philip Morris did not initiate and orchestrate the FTC's current adventure for altruistic reasons. Instead, Reynolds' and Philip Morris' behavior is but another example of a continuing pattern of most questionable competitive conduct. After years of most successful and arguably restrictive marketing practices, the two giants in the industry are now seeking to kill two of the greatest innovations in cigarette manufacturing in this decade: new filter developments such as that introduced by Brown & Williamson and generic and private label cigarettes introduced by Liggett.

In addition to the anticompetitive implications of the proposed changes, the proposed changes could have unintended consequences on consumer health. If the FTC's inconclusive research is wrong and the Barclay filter does indeed provide improved taste with relatively low tar and nicotine yields, then the FTC's alterations would have inhibited thousands of

2023093942

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Seventeen

individuals from converting from higher tar and nicotine yielding cigarettes to lower yielding Barclay or other cigarettes utilizing such filter technology.

V. The Proposed FTC "Remedies" are Worse Than the Perceived Problem.

Each of the proposed changes to the FTC testing methodology would create greater inaccuracies in measuring tar and nicotine yields and greater potential for misleading consumers than currently exists. For example, the most reliable study of the proposed Filtrona holder shows that it exerts nearly fifteen times as much pressure as is exerted by human lips. See Dr. Roger Kamm's Report, submitted to the FTC by Brown & Williamson. Likewise, the proposed alterations to the Cambridge holder would block exit channels on the Barclay filter in a highly artificial manner. Fiber optic research by Dr. Louis Fine confirms that the two proposed alterations to the current holder would severely exaggerate human smoking behavior and thereby result in distorted rankings of cigarette brands.

Even if the FTC were convinced that some change had to be made in the current FTC testing procedure, much more research would have to be undertaken before devising a new testing methodology. As Dr. Bock acknowledged in his report to the FTC, "[T]here is not sufficient evidence available to the Commission to select the most reliable and fair testing system . . . [and]

2023093943

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Eighteen

the data do not indicate the best remedial action for the Commission to take."

If new testing methodology is to be adopted, it should not involve discriminatory tinkering with the cigarette holder. Rather, it should build upon innovative cotinine research. All the FTC consultants agree that the most reliable measure of tar and nicotine intake is cotinine analysis. Thus, any alteration to the current FTC testing methodology should await refined cotinine research measuring all brands of cigarettes. Such research would be the most accurate way to check whether any change in the current FTC test is needed as well as to determine the reliability of proposed changes. At the present time, there is simply no reliable scientific benchmark against which the current proposed changes can be measured for all brands of cigarettes.

Finally, in view of the distortions which smoking behavior create in tar and nicotine intake, perhaps the soundest alternative to the existing test would be the abolition of all testing of tar and nicotine content on the grounds that such testing is inherently misleading to an individual smoker. In the words of Lynn T. Kozlowski:

"Although the words on cigarette packs and advertisements appear to indicate the dose of tar and nicotine to be found in a cigarette, smokers can easily double or triple yields beyond the nominal levels by

2023093944

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Nineteen

taking more frequent, larger, or higher velocity puffs. . . . Even the lowest-yield cigarettes in the market . . . can deliver two times as much nicotine, three times as much tar, and about four times as much carbon monoxide, if a smoker simply holds these ventilated-filter cigarettes three or four mm farther back in the mouth, thereby defeating the purpose of the vents with his or her lips. . . . Unless the low-yield brand leads to low-yield smoking . . . the smoker may be seriously mistaken about how much he or she is in control of the risks of cigarette smoking." L. Kozlowski, "Application of Some Physical Indicators of Cigarette Smoking", 6 Addictive Behaviors, 213-219 (1981).

Current research indicates that smoking behavior can seriously distort the tar and nicotine intake and that it would be virtually impossible to "educate" the consumer to change such smoking behavior. Id. Accordingly, a strong basis exists for abolishing all testing of tar and nicotine -- at least until further cotinine testing is undertaken. In any event, certainly a regulatory agency should have what leading experts suggest as "the minimum necessary" data in hand before embarking on testing changes which will leave the smaller firms dueling with phantoms in the dark as to future developments and the industry with fewer competitors.

In the meantime, although arguments could be made for imposing a general warning label on cigarettes informing smokers that smoking behavior can significantly affect tar and nicotine intake for all brands, such a label would appear to serve little

2023093945

PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Twenty

purpose as a practical matter. There already exists a most severe warning on cigarette packages and even more severe warnings are under consideration by the Congress. But even this alternative would be preferable to a change in testing procedures before adequate additional research is completed.

VI. Conclusion

In conclusion, the current FTC testing methodology should not be changed. The most reliable tests indicate that the current FTC testing methodology yields the correct relative ranking of cigarettes by tar and nicotine. None of the proposed testing alterations would improve the accuracy of the existing test with regard to relative rankings. At the same time, changing the testing methodology would cause significant consumer confusion and skepticism regarding FTC tests, discourage innovation, and further entrench the market power of the two dominant powers in the industry.

No standardized test will be perfect. And because of the serious consequences of altering a standardized test, such alterations should only be made if clear, reliable scientific data demonstrate that the alterations would significantly improve the accuracy of tar and nicotine results across a broad spectrum of brands. No such data now exist. Thus, to change the test now would be to put the cart before the horse, while at

2023093946

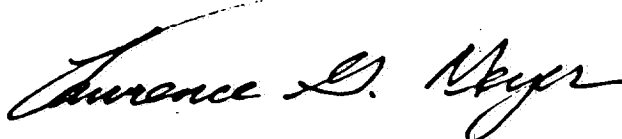
PATTON, BOGGS & BLOW

Emily H. Rock
June 30, 1983
Page Twenty-One

the same time seriously handicapping competitive innovation and product development in the cigarette industry.

Because of the importance of these issues, we hereby request an opportunity to present our views orally to the Commission and its staff. We would respectfully suggest that the Commission proceed only after oral hearings on this subject either before the full Commission or a designated Administrative Law Judge.

Respectfully submitted,



Lawrence G. Meyer
Garret G. Rasmussen

LGM:km

20230933947